

240/59

IN THE CHANCERY COURT FOR SHELBY COUNTY, ~~TENNESSEE~~
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

| | | |
|------------------------------------|---|------------------|
| STATE OF TENNESSEE, <i>ex rel.</i> |) | |
| ROBERT E. COOPER, JR., ATTORNEY |) | |
| GENERAL and REPORTER, |) | |
| |) | |
| Plaintiff, |) | No. CH-08-1979-1 |
| v. |) | JURY DEMAND |
| |) | |
| |) | |
| BLUEHIPPO FUNDING, LLC, et al. |) | |
| |) | |
| Defendants. |) | |

**ORDER GRANTING STATUTORY TEMPORARY INJUNCTION, ASSET FREEZE,
AND OTHER EQUITABLE RELIEF
INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter comes before the Court on the motion of the State of Tennessee, *ex rel.*, Robert E. Cooper, Jr., Attorney General and Reporter, ("State" or "Attorney General"), on behalf of Mary Clement, the Director of the Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance.

On October 27, 2008, the State filed an action alleging that the Defendants, BlueHippo Funding, LLC, BlueHippo Capital, LLC, Virginia, and BlueHippo Capital, LLC, Nevada, have engaged in and continue to engage in commercial conduct that violates the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. § 47-18-101, *et seq.*, and the Prizes Offered as Inducements Statute, Tenn. Code Ann. § 47-18-120, *et seq.*, contained in the TCPA. The Defendants subsequently removed the State's action to federal court claiming diversity of citizenship and that the \$75,000 amount-in-controversy had been satisfied. In an order dated December 10, 2008, the federal district court remanded the Attorney General's action to state

court because it found that no basis for federal jurisdiction existed.

Following remand, the State's Motion for Temporary Injunction, Asset Freeze, and Other Equitable Relief came to be heard on January 7, 2009. Based upon a review of the pleadings, the evidence produced and referenced at the hearing, the affidavits, the record herein, and the oral arguments of counsel, the Court finds that the State's Motion should be granted according to the terms below. Accordingly, it is hereby **ORDERED, ADJUDGED, AND DECREED:**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over the allegations made in the State's Complaint and venue is proper in Shelby County pursuant to Tenn. Code Ann. § 47-18-108(a)(3).

2. This Court has the authority to enter this temporary injunction and asset freeze pursuant to Tenn. Code Ann. § 47-18-108(a)(4), which states:

The courts are authorized to issue orders and injunctions to restrain and prevent violations of this part, and such orders and injunctions shall be issued without bond.

and Tenn. Code Ann. § 47-18-108(a)(1), which states:

Whenever the division has reason to believe that any person has engaged in, is engaging in, or based upon information received from another law enforcement agency, is about to engage in any act or practice declared unlawful by this part and that the proceedings would be in the public interest, the attorney general and reporter, at the request of the division, may bring an action in the name of the state against such person to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such act or practice.

3. On an application for a temporary injunction, the Court has four factors that the Court usually considers in determining whether such a temporary injunction should be issued. The first being that the Plaintiff would suffer irreparable harm if the relief is not granted, that the

“Approximate
Verifiable Retail
Value”

means the price at which the person offering the item can substantiate that a substantial number of these items have been sold at retail by another person or, in the event that such substantiation is unavailable, an amount equal to no more than three (3) times the amount actually paid by the sponsor or promoter for the item. (Tenn. Code Ann. § 47-18-120(c)(1)(D)).

“Consumer”

shall mean any natural person who seeks or acquires by purchase, rent, lease, assignment, award by chance, or other disposition, any goods, services, or property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated or any person who purchases or to whom is offered for sale a franchise or distributorship agreement or any similar type of business opportunity. (Tenn. Code Ann. § 47-18-103(2)).

“Deceptive”

shall mean causing or tending to cause a consumer to believe what is false or misleading or tending to mislead a consumer as to a matter of fact. (*Tucker v. Sierra Builders*, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005)).

“Initial Offer”

shall mean the first contact with a consumer or person, whether verbally or in writing. (Tenn. Code Ann. § 47-18-120(a)(2)).

“Prize”

shall mean prize, gift, award, incentive promotion or any thing of value. “Prize” includes, but is not limited to, any thing of value offered in a sweepstakes, contest, drawing, incentive offer, premium promotion or similar promotional offer by whatever name the company uses. (Tenn. Code Ann. § 47-18-120(a)(3)).

“Unfair”

shall mean causing substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

Substantial injury involves monetary injury. Injury will be considered substantial if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. Consumers cannot reasonably avoid injury when a merchant’s sales practices unreasonably create or take advantage of an obstacle to the free exercise of consumer decision-making including withholding important information from consumers, overt coercion, or exercising undue influence over a highly susceptible class of consumers.

Tucker v. Sierra Builders, 180 S.W.3d 109, 117 (Tenn. Ct. App. 2005).

Plaintiff has no adequate remedy at law, that the action is in the public interest and that such public interest would be weighed or balanced against any harm to the Defendants to the extent that the public interest would outweigh such private interest, and that the Plaintiff is likely to prevail on the merits of the case when the case is presented on its final basis.

4. The State has shown a likelihood that it will prevail on the merits upon a final disposition of the case, which alleges multiple violations of both the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.* and the Prizes Offered As Inducements statute, Tenn. Code Ann. § 47-18-120, *et seq.*, which is a part of the Tennessee Consumer Protection Act.

5. The State has submitted that under a statutory injunction the relevant inquiries under FTC case law and under the State's temporary injunction authority, Tenn. Code Ann. § 47-18-108(a)(1), are whether the State has shown a likelihood of success on the merits of its action and whether the injunction would be in the public interest. Since the statutory temporary injunction standard encompasses two of the four standards used under the traditional standard, the Court finds that an injunction and asset freeze may be appropriate under either the traditional temporary injunction standard or the statutory temporary injunction standard.

6. The Court finds that the Defendants' sales in Tennessee constitute .875% of their total sales nationwide.

ORDER OF TEMPORARY INJUNCTION AND ASSET FREEZE

DEFINITIONS

The following definitions apply to this Order and are taken from the cited statutory definitions or from case law:

Pursuant to Tenn. Code Ann. § 47-18-108(a)(1) and (a)(4), based on the above **and lasting six months until the conclusion of trial, currently scheduled for June 1, 2009**, the Defendants, BlueHippo Funding, LLC, BlueHippo Capital, LLC, Virginia, and BlueHippo Capital, LLC, Nevada, their officers, directors, agents, successors and assigns, and any other persons in active concert or participation with the above-named Defendants who receive actual notice of this temporary injunction are prohibited from directly or indirectly engaging in any acts or practices which:

- (1) are unfair or deceptive, as defined in this Order;
- (2) misrepresent the terms, conditions, or provisions of the Defendants' offers by way of advertisements, letters, contracts, including terms, conditions or provisions concerning rebates or the timing of distribution of products or services to consumers in Tennessee;
- (3) constitute transacting business or lending in this State if the Defendants do not possess a license to conduct business or lend money and do not otherwise fall within an exception to such licensing;
- (3) violate the Tennessee Consumer Protection Act, including by:
 - (a) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services. (Tenn. Code Ann. § 47-18-104(b)(2));
 - (b) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have. (Tenn. Code Ann. § 47-18-104(b)(5));
 - (c) Advertising goods or services with intent not to sell them as advertised. (Tenn. Code Ann. § 47-18-104(b)(9));
 - (d) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions. (Tenn. Code Ann. § 47-18-104(b)(11));
 - (e) Representing that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law. (Tenn. Code Ann. § 47-18-

104(b)(12));

(f) Using an advertisement containing an offer to sell goods or services when the offer is not a bona fide effort to sell the advertised goods or services. An offer is not bona fide, even though the true facts are subsequently made known to the buyer, if the first contact or interview is secured by deception. (Tenn. Code Ann. § 47-18-104(b)(22)); and

(g) Advertising, promoting, selling or offering for sale any good or service that is illegal or unlawful to sell in the state. (Tenn. Code Ann. § 47-18-104(b)(44)).

(4) violate the Prizes Offered as Inducements statute, Tenn. Code Ann. § 47-18-120 *et seq.* contained in the Tennessee Consumer Protection Act, by:

(a) Failing to clearly and conspicuously state the name and street address of the person making the offer in an initial offer. (Tenn. Code Ann. § 47-18-120(c)(1)(A));

(b) Failing to clearly and conspicuously disclose the approximate verifiable retail price for each prize or the price of any product offered for sale through the promotional program in a position immediately adjacent to the item when the initial offer is in writing. Tenn. Code Ann. § 47-18-120(c)(1)(D);

(c) Failing to clearly and conspicuously disclose each item's approximate verifiable retail value when the initial offer is verbal. Tenn. Code Ann. § 47-18-120(c)(1)(E);

(d) Failing in an initial offer to give a recipient a general description of the types and categories of restrictions, qualifications, or other conditions, that must be satisfied before the consumer or person is entitled to receive or use the prize or product or service offered. Tenn. Code Ann. § 47-18-120(c)(1)(H);

(e) Failing in an initial offer to give a recipient an approximate total of all costs, fees, or other monetary obligations that must be satisfied before the consumer or person is entitled to receive or use the prize or product or service offered. Tenn. Code Ann. § 47-18-120(c)(1)(I);

(f) Failing, either in an initial offer or, at a minimum, before an offer can be accepted, to clearly and conspicuously state verbally, or in writing, and upon request in writing a general

description of the types and categories of restrictions, qualifications, or other conditions, that must be satisfied before the consumer or person is entitled to receive or use the prize or product or service offered including any other conditions such as financial qualifications and all other material rules, terms or restrictions governing an offer that is an inducement to purchase a good, service, or other product or to otherwise incur a monetary obligation. Tenn. Code Ann. § 47-18-120(c)(2)(A)(iv)-(v);

(g) Failing, either in an initial offer or, at a minimum, before an offer can be accepted, to clearly and conspicuously state verbally, or in writing, and upon request in writing the refund, exchange or return policies in regard to any offer that is an inducement to purchase a good, service or other product or otherwise incur a monetary obligation. Tenn. Code Ann. § 47-18-120(c)(2)(B);

(h) Excluding any foreign tax rates, failing, either in an initial offer or, at a minimum, before an offer can be accepted, to clearly and conspicuously state verbally, or in writing, and upon request in writing the approximate total of costs, fees or other monetary obligations that must be satisfied before the consumer or person is entitled to receive or use the prize, or product or service offered, including, but not limited to: handling, shipping, delivery, freight, postage or processing fees, charges or other additional costs for the receipt or use of the prize or product or service offered. Tenn. Code Ann. § 47-18-120(c)(2)(C);

(i) Misrepresenting in any manner the rules, terms, restrictions, monetary obligations or conditions of participation in the promotional plan or offer. Tenn. Code Ann. § 47-18-120(c)(3)(A); and

(j) Failing to award or distribute the prize or product or service offered in accordance with the rules, terms, and conditions of the offer or promotional program as stated or disclosed in accordance with the Prizes Offered as Inducements statute. Tenn. Code Ann. § 47-18-120(c)(3)(E).

ASSET FREEZE

Based on the above and in order to preserve funds for consumer restitution and/or disgorgement of ill-gotten gains and in direct advancement of the State's police and regulatory power, civil law enforcement authority, and the purposes of the Tennessee

Consumer Protection Act identified at Tenn. Code Ann. § 47-18-102, including allowing the State to provide for the protection of consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices, the advancement of ethical standards of dealing between persons engaged in business, and the maintenance of the integrity of the marketplace in Tennessee as a whole, the Defendants, BlueHippo Funding, LLC, and BlueHippo Capital, LLC, Virginia, and BlueHippo Capital, LLC, Nevada, their officers, directors, agents, successors and assigns, and any other persons in active concert or participation with the above-named Defendants who receive actual notice of this Order:

- (1) Shall be prohibited from liquidating, encumbering, borrowing against, withdrawing, transferring to another company or person or otherwise dissipating the sum of **\$1,000,000** U.S. dollars.

This sum shall be deposited in a registry account under the care, custody, and control of the Clerk and Master **by no later than the close of business on February 6, 2009 Central Time**. This sum shall be held *in custodia legis* by the Clerk and Master as described below. The account will be listed as "Monies Held For Potential Consumer Restitution Pursuant to Temporary Injunction Order in the *Case of State of Tennessee v. BlueHippo Funding, LLC, et al.*" The monies shall be placed in a registry account that will bear the highest interest rate. The monies shall be held in a registry account of this Court until an Order by this Court expressly stating otherwise.

Pursuant to Tenn. Code Ann. § 47-18-108(a)(4) the injunction is issued without cost bond from the State. Pursuant to Tenn. Code Ann. § 47-18-116 no costs shall be taxed or assessed to the State under this Motion.

Based on the above, the State's Motion for Temporary Injunction, Asset Freeze, and Other Equitable Relief is **GRANTED**. This Order shall remain in full force and effect until otherwise ordered by this Court.

Entered this the 4th day of February, 2009 at 10:10 a.m.

Walter L. Evans
CHANCELLOR WALTER EVANS
Shelby County Chancery Court, Part I
Thirtieth Judicial District at Memphis

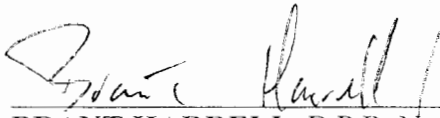
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By

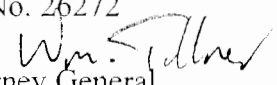
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D.C. & M.

Respectfully submitted,

 *By Permission;*

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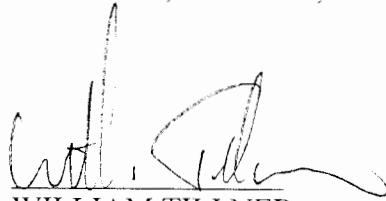
Attorneys for the State of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via electronic mail and via U.S Mail on this the ~~27th~~ ^{4th} day of ~~January~~ ^{February} to:

(1) Gerald D. Neenan (gneenan@nealharwell.com), Kendra Sampson (ksampson@nealharwell.com), Neal and Harwell, PLC, 150 Fourth Avenue North, Suite 2000, Nashville, Tennessee 37219; and

(2) Clayton Friedman (cfriedman@manatt.com), Michael Yaghi (myaghi@manatt.com), Manatt, Phelps, and Phillips, LLP, Park Tower, 695 Town Center Drive, 14th Floor, Costa Mesa, CA 92626.



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